UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TAHIRIH JUSTICE CENTER, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

Civil Action No. 21-124 (TSC)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The Secretary of Homeland Security is entrusted with decisions of immense consequence. When implementing the laws on asylum and other protections from persecution and torture, these decisions can make the difference between life and death for some individuals. To help ensure that such power is used responsibly, the Constitution requires the Secretary to be confirmed by the Senate after presidential nomination—a structural safeguard that protects individual liberty by promoting democratic accountability and preventing executive abuse of the appointment power.

For more than a year, Chad Wolf ran the Department of Homeland Security as its purported Acting Secretary, ushering in an aggressive array of new policies meant to upend the nation's legal protections for immigrants and asylum seekers. Yet Wolf had no lawful basis for wielding that power. Every court to resolve the matter (eight in all), as well as the Government Accountability Office, has agreed that Wolf acted illegally when he assumed the role of Acting Secretary and employed the Secretary's powers.

The government's convoluted defense of Wolf's tenure has not just been rejected—it has been derided as "interpretative acrobatics" contradicting "the plain language" of the relevant authorities, *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 20-21 & n.6 (D.D.C. 2022), as a "tortured" insistence "that the text means something other than what it says," *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020), and even as "lack[ing] a good-faith basis in law or fact," *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966, 973 (N.D. Cal. 2021).

This Court should reach the same conclusion. Wolf's actions as Acting Secretary violated the Homeland Security Act ("HSA"), the Federal Vacancies Reform Act ("FVRA"), and the Appointments Clause of the Constitution. As a result, those actions are legally void.

The capstone of Wolf's assault on those seeking refuge in the United States was the final rule challenged in this case, issued by the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") in the twilight of the last administration, well after numerous courts had already ruled Wolf's tenure illegal. *See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (Dec. 11, 2020) (the "Anti-Asylum Rule" or the "Rule"). This new Rule imposes vague and sweeping limitations on asylum eligibility that, if enforced, will dramatically curtail the ability of people fleeing persecution to obtain relief. Through its myriad changes to the substantive and procedural standards governing asylum and related protections, the Rule will send bona fide asylum seekers to countries where they will likely face violence, torture, and even death. It will therefore have a devastating impact on these individuals and impede the work of those who provide legal services to them, including Plaintiffs.

For three separate reasons, Wolf's approval of the Anti-Asylum Rule violated the HSA and the FVRA. First, Wolf was appointed Acting Secretary under an order signed by his ostensible predecessor in that role, Kevin McAleenan. *See* 85 Fed. Reg. at 80,381. But as courts have uniformly recognized, McAleenan himself never lawfully became the Department's Acting Secretary. The claimed basis for McAleenan's own ascension to that role—an order signed by former Secretary Kirstjen Nielsen on her last day in office—simply does not say what the government has doggedly insisted it says. Because McAleenan was never a valid Acting Secretary, he had no authority to choose Wolf as his hand-picked successor. Wolf therefore assumed the role in violation of the statutes that prescribe who serves as Acting Secretary.

Second, even if Kevin McAleenan *had* been a legitimate Acting Secretary, he could not have changed the Department's internal regulations to make Wolf his replacement. The HSA

permits only a Senate-confirmed Secretary, not an Acting Secretary, to establish regulations designating the order of succession for the Secretary's office.

Third, *even if* McAleenan were originally a valid Acting Secretary, and *even if* Acting Secretaries could revise the Department's order of succession, McAleenan's power to do so expired before he attempted to make that change. By the time McAleenan signed his order to elevate Wolf, the FVRA's time limits on acting service had run out.

In addition to defying the HSA and FVRA, Wolf's tenure violated the Constitution. The executive branch has no inherent authority to fill vacancies with acting officers. Wolf was not confirmed by the Senate as Homeland Security Secretary, and he lacked statutory authority to exercise the Secretary's powers temporarily. When a person fills a vacant office without Senate confirmation or any statutory authorization, as Wolf did, it violates the Appointments Clause.

Because Wolf exercised the powers of the Secretary's office illegally when he approved the Anti-Asylum Rule, the FVRA dictates that the Rule "shall have no force or effect." 5 U.S.C. § 3348(d)(1). Moreover, the Administrative Procedure Act ("APA") independently requires vacating the Rule as "not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," and "contrary to constitutional . . . power." *Id.* § 706(2). Wolf's unlawful approval is also subject to prospective relief under this Court's equitable power to remedy *ultra vires* action, and it merits a declaratory judgment as well.

The Anti-Asylum Rule never should have issued, because it was never approved by a Homeland Security official with the authority to do so—as the federal courts to consider the matter have all agreed. Defendants' refusal to rescind this illegal Rule has forced Plaintiffs to seek judicial relief. This Court should declare the Rule unlawful and vacate it.

LEGAL BACKGROUND

I. The Appointments Clause and the Federal Vacancies Reform Act

As a "critical structural safeguard" of the Constitution, *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 293 (2017) (quotation marks omitted), the Appointments Clause "helps to preserve democratic accountability," *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1657 (2020), by combatting the "manipulation of official appointments"—"one of the American revolutionary generation's greatest grievances against executive power," *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (quotation marks omitted). Indeed, "the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Id.* (quotation marks omitted).

To "curb Executive abuses of the appointment power," *Edmond v. United States*, 520 U.S. 651, 659 (1997), the Appointments Clause requires "the Advice and Consent of the Senate," U.S. Const. art. II, § 2, cl. 2, before the President may install principal officers of the United States. "By limiting the appointment power in this fashion," the Constitution makes officers "accountable to political force and the will of the people." *Fin. Oversight & Mgmt. Bd.*, 140 S. Ct. at 1657 (quotation marks omitted).

Because Senate confirmation "can take time," Congress has long "given the President *limited authority* to appoint acting officials to temporarily perform the functions of a vacant [Senate-confirmed] office." *SW Gen.*, 580 U.S. at 293-94 (emphasis added). But Congress has always ensured that Presidents may not use acting officials to circumvent the Appointments Clause. *E.g.*, Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415 (prohibiting acting service "for a longer term than six months"). In the mid-nineteenth century, "Congress repealed the existing statutes on the subject of vacancies and enacted in their stead a single statute," the Vacancies

Act. *Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision*, 139 F.3d 203, 210 (D.C. Cir. 1998). The FVRA is "the latest version of that authorization." *SW Gen.*, 580 U.S. at 293.

The FVRA was enacted in 1998 "as a reclamation of the Congress's Appointments Clause power," *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), in response to presidential defiance of the existing Vacancies Act. *See* S. Rep. No. 105-250, at 4-5 (1998) ("the Senate's confirmation power is being undermined as never before"). Beginning in the 1970s, the Justice Department began claiming that "the head of an executive agency had independent authority apart from the Vacancies Act to temporarily fill vacant offices." *SW Gen.*, 580 U.S. at 294. "These acting officers filled high-level positions, sometimes in obvious contravention of the Senate's wishes." *Id.* at 295. "Perceiving a threat to the Senate's advice and consent power," Congress "replaced the Vacancies Act with the FVRA." *Id.* Congress's aim was "to create a clear and exclusive process to govern the performance of duties of [Senate-confirmed] offices in the Executive Branch." S. Rep. No. 105-250, *supra*, at 1.

Accordingly, the FVRA carefully restricts who may serve as an acting officer when a vacancy arises. By default, the "first assistant" to a vacant office steps in automatically. 5 U.S.C. § 3345(a)(1). The "first assistant" is a position designated by statute or regulation. *E.g.*, 6 U.S.C. § 113(a)(1)(A) (naming the Deputy Secretary of Homeland Security as "the Secretary's first assistant"). Only the President "may override that default rule by directing [a different person] to become the acting officer instead." *SW Gen.*, 580 U.S. at 293. Even then, the FVRA restricts the President's choices about whom to select. *See* 5 U.S.C. § 3345(a)(2), (3).

To prevent acting officers from filling vacancies for "constitutionally unacceptable" periods of time, S. Rep. No. 105-250, *supra*, at 8, the FVRA also limits the length of their service. Relevant here, vacant offices may be filled by acting officials "for no longer than 210

days beginning on the date the vacancy occurs," 5 U.S.C. § 3346(a)(1), unless the President nominates someone to the office, which extends the timeline, *id.* § 3346(a)(2), (b)(1).

Crucially, the FVRA is now "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office." *Id.* § 3347(a). There are only two exceptions. One exception accommodates recess appointments. *Id.* § 3347(a)(2). The other permits an agency's organic statute to depart from the FVRA by "expressly" designating an official to perform the vacant office's functions, or by "expressly" authorizing the agency head to make such a designation. *Id.* § 3347(a)(1). But if an office is not being filled according to the FVRA or one of these exceptions, "the office shall remain vacant." *Id*. § 3348(b)(1).

The FVRA explicitly prohibits the abuses that prompted its passage. Before 1998, agencies tried to evade vacancies rules by delegating the powers of vacant offices to other personnel who could not lawfully serve as acting officers. For instance, to skirt the rules about who could be an acting officer and for how long, agency heads would often "delegate" all of their powers to another official just before resigning. *See* S. Rep. No. 105-250, *supra*, at 5-6, 12. To prevent this, the FVRA specifies that laws empowering agency heads "to delegate duties" or "to reassign duties" cannot be used to circumvent the FVRA's limits. 5 U.S.C. § 3347(b).

Finally, to ensure compliance with these rules and safeguard the Senate's Appointments Clause power, the FVRA imposes strict penalties. If someone performs a function or duty of a vacant office without authorization by the FVRA or one of its exceptions, that action "shall have no force or effect." *Id.* § 3348(d)(1). And the action "may not be ratified." *Id.* § 3348(d)(2).

II. The Homeland Security Act

The Homeland Security Act ("HSA") establishes the office of the Secretary of Homeland Security and other DHS officials. The statute incorporates the FVRA with modifications.

The Secretary, like all principal officers, is "appointed by the President, by and with the advice and consent of the Senate." 6 U.S.C. § 112(a)(1). The Deputy Secretary is designated as "the Secretary's first assistant" for FVRA purposes. *Id.* § 113(a)(1)(A). Under the FVRA alone, only the Deputy Secretary could automatically perform the Secretary's functions during a vacancy. 5 U.S.C. § 3345(a)(1). And only the President could direct anyone else to perform those functions instead. *Id.* § 3345(a)(2), (3).

Modifying these rules, the HSA establishes that when there is no Deputy Secretary, the Department's third-ranking officer, the Under Secretary for Management, becomes the Acting Secretary instead. 6 U.S.C. § 113(g)(1). In addition, the Secretary may extend this automatic line of succession even further, to prepare for situations in which the top three positions are all vacant: "notwithstanding" the FVRA, "the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary." *Id.* § 113(g)(2).

A person who assumes the position of Acting Secretary without authorization by 6 U.S.C. § 113 or the Department's "further order of succession" violates the HSA. And because such a person is filling a Senate-confirmed office without complying with the FVRA or one of its statutory alternatives, that person violates the FVRA when he or she performs the functions and duties of the Secretary's office. 5 U.S.C. §§ 3347(a), 3348(b).

DHS actions therefore "have no force or effect" if they were taken by a person who was performing a function or duty of the Secretary's office without authorization by the HSA or the FVRA. *Id.* § 3348(d)(1); *see SW Gen.*, 580 U.S. at 298 n.2 ("actions taken in violation of the FVRA are void *ab initio*"). These unlawful actions may not be ratified. 5 U.S.C. § 3348(d)(2).

Moreover, because such actions are "in excess of statutory jurisdiction, authority, or limitations" and are "not in accordance with law," they also must be set aside as "unlawful"

under the APA. 5 U.S.C. § 706(2)(A), (C); *see SW Gen.*, 796 F.3d at 79-81; *e.g.*, *Asylumworks*, 590 F. Supp. 3d at 26 (vacating regulation under both the FVRA and the APA); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 37 (D.D.C. 2020) (same); *Bullock v. U.S. Bureau of Land Mgmt.*, No. 20-62, 2020 WL 6204334, at *2 (D. Mont. Oct. 16, 2020) (same).

The HSA also sets forth the Secretary's powers. Relevant here, the Secretary is responsible for issuing regulations that implement the HSA and other laws granting authority to the Secretary. 6 U.S.C. § 112(e). And with some exceptions, the Secretary is "charged with the administration and enforcement of . . . all . . . laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). He "shall establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter." *Id.* § 1103(a)(3).

III. Asylum and Other Statutory Protections from Persecution and Torture

Federal law protects noncitizens who fear persecution and violence in their countries of nationality or last residence. These statutory protections include asylum, withholding of removal, and safeguards implementing the Convention Against Torture.

Congress enacted statutory asylum protections to fulfill the United States's obligations under the Refugee Convention of 1951 and its 1967 Protocol. The Convention was designed to avoid the horrors refugees experienced during World War II. The 1967 Protocol, which the United States ratified in 1968, expanded the Convention's protections. In the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, Congress implemented these provisions by creating an asylum process for people fearing persecution in their home countries. *Id.* § 101(a) (codified at 8 U.S.C. § 1521 Note). Any noncitizens present in the United States may apply for asylum. 8 U.S.C. § 1158(a)(1)(A). Asylum may be granted to individuals who have suffered persecution, or have a well-founded fear of it, on account of "race, religion, nationality, membership in a

particular social group, or political opinion." *Id.* § 1158(b)(1)(B). The manner in which the executive branch construes these terms is therefore vital in determining who can obtain asylum.

Noncitizens are also eligible for "withholding of removal" if their life or freedom would be threatened in the proposed country of removal due to one of the protected grounds covered by asylum law. *See id.* § 1231(b)(3)(A). Withholding of removal requires satisfying a higher standard of proof than asylum, but there are fewer statutory bars to relief. *Id.* § 1231(b)(3)(B).

The United States ratified the Convention Against Torture in 1994, agreeing not to "effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of being subjected to torture." *Id.* § 1231 Note. Unlike with asylum and withholding of removal, the threated harm need not be on account of a statutorily protected ground like race, religion, or membership in a particular social group.

Noncitizens who are in removal proceedings may apply for asylum, withholding of removal, or Convention Against Torture protection as a defense against removal. *See id.* § 1229a; 8 C.F.R. § 208.2(b). Other noncitizens may file "affirmative" applications for asylum. *See* 8 C.F.R. §§ 208.2(a), 208.9. Individuals granted asylum can become lawful permanent residents and eventually U.S. citizens, 8 U.S.C. §§ 1159(b), 1427, can work without restriction, 8 C.F.R. § 274a.12(a)(5), and can obtain asylum for spouses or children, 8 U.S.C. § 1158(b)(3).

FACTUAL BACKGROUND

I. Chad Wolf Is Unlawfully Appointed as Acting Secretary of Homeland Security.

As described above, when the Secretary of Homeland Security's office is vacant, the Deputy Secretary automatically becomes Acting Secretary. 6 U.S.C. § 113(a)(1)(A). If the Deputy's office is also vacant, the Under Secretary for Management becomes Acting Secretary. *Id.* § 113(g)(1). In addition, the Secretary may establish a "further order of succession," thereby

extending this list to other DHS officials. *Id.* § 113(g)(2).

The Secretary has established that further order of succession in an agency regulation known as Delegation 106, which governs vacancies in the Department's top offices. *See* DHS Delegation 106 (Revision 8), *DHS Orders of Succession and Delegations of Authorities for Named Positions* (Dec. 15, 2016). Delegation 106 is periodically updated. *See id.*, Attachment 1 (indicating dates of revisions).

In 2019, Delegation 106 provided two different lines of succession for two different kinds of scenarios in which the Secretary's office became vacant. For vacancies caused by a Secretary's resignation, Delegation 106 incorporated a line of succession set forth in a 2016 executive order: "In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753." DHS Delegation 106 (Revision 8.4), § II.A (Feb. 15, 2019). Executive Order 13753 lists eighteen DHS officials who are directed to serve as Acting Secretary, "in the order listed," if the Secretary "has died, resigned, or otherwise become unable to perform the functions and duties of the office." Exec. Order No. 13753, § 1, 81 Fed. Reg. 90,667 (Dec. 9, 2016).

Separately, Delegation 106 provided a different line of succession for vacancies caused by emergencies. *See* DHS Delegation 106 (Revision 8.4), *supra*, § II.B. This emergency line of succession was set forth in an "Annex A." *See id.* ("I hereby delegate to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office . . . in the event I am unavailable to act during a disaster or catastrophic emergency.").

Although Delegation 106 was periodically revised, DHS consistently preserved this two-track system in which vacancies caused by death or resignation were governed by Executive

Order 13753, while vacancies caused by emergencies or disasters were governed by Annex A.

The last Senate-confirmed DHS Secretary in the Trump administration was Kirstjen Nielsen. In April 2019, President Trump initiated an abrupt purge of Department leadership, reportedly "at the urging of White House senior adviser Stephen Miller" and "to reinstate the family separation policy, which Nielsen resisted." Priscilla Alvarez et al., *Trump Overseeing 'Near-Systematic Purge' at Department of Homeland Security*, CNN Politics (Apr. 8, 2019), https://www.cnn.com/2019/04/08/politics/miller-nielsen-trump-immigration-homeland-security/index.html. Nielsen announced her resignation on April 7, *see* Message from Secretary of Homeland Security Kirstjen M. Nielsen (Apr. 7, 2019), and her final day was April 10, *see* Farewell Message from Secretary Kirstjen M. Nielsen (Apr. 10, 2019).

Before leaving office, Secretary Nielsen signed an order revising Annex A to Delegation 106. *See* Memo. for the Secretary from John M. Mitnick, General Counsel, at 1 (Apr. 9, 2019) (hereinafter "Nielsen Order"). Nielsen revised the text of Annex A by reordering the list of officials in its line of succession. *See id.* at 2. Apart from altering the text of Annex A, Nielsen approved no other changes to Delegation 106 or the Secretary's line of succession.

The next day, DHS updated Delegation 106 to implement Nielsen's order. Consistent with her order, there was now a revised line of succession in Annex A for vacancies caused by emergencies. *See* DHS Delegation 106 (Revision 8.5), § II.B (Apr. 10, 2019); *id.*, Annex A. Also consistent with her order, the line of succession for vacancies caused by resignations was unchanged. Instead, resignations were still "governed by Executive Order 13753." *Id.*, § II.A.

When Nielsen left office on April 10, the Deputy Secretary and Under Secretary for Management positions were both vacant. Therefore, the Secretary's vacancy was governed by the further order of succession designated in Delegation 106. *See* 6 U.S.C. § 113(a)(1)(A),

(g)(1), (g)(2). And according to Delegation 106, the executive order provided the applicable line of succession because the vacancy in the Secretary's office was caused by a resignation. *See* DHS Delegation 106 (Revision 8.5), *supra*, § II.A.

Under Delegation 106 and the executive order, the Acting Secretary should have been the Under Secretary for National Protection and Programs (Christopher Krebs), who was the fourth official in line for vacancies caused by resignations. *See* Exec. Order No. 13753, *supra*, § 1; U.S. Gov't Accountability Office, No. B-331650, *Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security*, at 8 n.11 (Aug. 14, 2020) (hereinafter "GAO Decision") (explaining that Krebs was the first available official in the order of succession when the vacancy began).

At this time, Kevin McAleenan was the Commissioner of U.S. Customs and Border Protection. *Id.* at 2. That position was *seventh* in line to become Acting Secretary. *See* Exec. Order No. 13753, *supra*, § 1. Other officials higher up in the chain were available to serve as Acting Secretary, including Under Secretary Krebs.

McAleenan nevertheless took over as Acting Secretary and wielded the Secretary's powers for seven months. During that time, President Trump did not nominate anyone to be Secretary of Homeland Security. Instead, just before McAleenan resigned in November 2019, McAleenan signed an order attempting to make Chad Wolf the next Acting Secretary.

McAleenan tried to make Wolf his successor by revising Delegation 106. He first directed that Executive Order 13753 would no longer provide the line of succession for vacancies caused by resignations. Instead, when a Secretary resigned, succession would be "governed by Annex A." Order, Kevin K. McAleenan, Acting Secretary of Homeland Security, *Amendment to the Order of Succession for the Secretary of Homeland Security*, at 1 (Nov. 8,

2019). Importantly, this was a change that Kirstjen Nielsen did not make seven months earlier.

Second, McAleenan revised the text of Annex A itself, once again reordering its list of officials. He moved the office held by Chad Wolf (Under Secretary for Strategy, Policy, and Plans) from eleventh in the line of succession to fourth. *See id.* DHS then revised Delegation 106 accordingly. *See* DHS Delegation 106 (Revision 8.6), § II.A (Nov. 14, 2019); *id.*, Annex A.

McAleenan left office shortly after signing this order. When he did, the top three positions in the new line of succession for resignations were all vacant. Chad Wolf therefore took over as Acting Secretary upon McAleenan's departure. Wolf then exercised the powers of Homeland Security Secretary for a full year and two months, resigning in January 2021.

II. Federal Courts Uniformly Conclude that Wolf's Tenure Was Illegal.

During the long period in which DHS lacked a Senate-confirmed Secretary—almost two years—the Secretary's office was not idle. To the contrary, Kevin McAleenan and Chad Wolf pursued an aggressive agenda of new rules and policies that made sweeping changes to myriad aspects of immigration and asylum law. That effort culminated in the Rule challenged here.

Before long, however, the Department's internal documents concerning the appointments of McAleenan and Wolf were made public, laying bare the flaws in McAleenan's appointment. Litigants then began challenging the new rules and policies on the ground that McAleenan's appointment was unlawful, making Wolf's appointment (by McAleenan) unlawful as well. Those challenges yielded an unbroken string of decisions holding that McAleenan and Wolf held the Acting Secretary position illegally, rendering their actions invalid.[1]

[1] *See Asylumworks*, 590 F. Supp. 3d at 21-22; *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 943-44 (N.D. Cal. 2021); *Batalla Vidal*, 501 F. Supp. 3d at 132; *CASA de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 533-36 (N.D. Cal. 2020); *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS*, No. 20-8897,

The only circuit judge with occasion to address the question also concluded that the plaintiffs in that case showed a likelihood of success on their claim that "Chad Wolf was not lawfully acting as the Acting Secretary of DHS." Order at 3, *Manzanita Band of the Kumeyaay Nation v. Wolf*, No. 20-5333 (D.C. Cir. Nov. 23, 2020) (Millett, J., dissenting in part).

Likewise, the only government oversight body to address the question publicly also concluded that Wolf served unlawfully, having assumed the position of Acting Secretary "by reference to an invalid order of succession." GAO Decision, *supra*, at 11.

In the wake of this judicial consensus, DHS attempted a series of increasingly outlandish bureaucratic maneuvers during the last few months of the Trump administration to salvage the legitimacy of Wolf and McAleenan's actions. *See* Compl. ¶¶ 150-169. These efforts eventually led to the spectacle of Wolf resigning as Acting Secretary, then immediately being delegated the purported authority to ratify his own prior actions. *Id.* ¶¶ 178-90.

The government has since abandoned any reliance on these eleventh-hour machinations. *Cf. Batalla Vidal v. Wolf*, No. 16-4756, 2020 WL 7121849, at *1 n.2 (E.D.N.Y. Dec. 4, 2020) (describing these maneuvers as a "dead letter" with "no legal significance"); *Pangea*, 512 F. Supp. 3d at 974 (similar). But Wolf later said he was driven to these lengths by the "meritless court rulings" regarding his appointment, *see* A Message from Acting Secretary Chad F. Wolf (Jan. 11, 2021), https://s3.documentcloud.org/documents/20447898/wolfresigns.pdf, and that his conversations with DHS and DOJ attorneys made clear that "there was no light at the end of the tunnel, there was no avenue to really fight this," Priscilla Alvarez, *Acting ICE Director Is*

2022 WL 4596611 (N.D. Cal. Aug. 10, 2022), *appeal filed*, No. 22-16552 (9th Cir.); *La Clínica de La Raza v. Trump*, No. 19-4980, 2020 WL 6940934, at *12-14 (N.D. Cal. Nov. 25, 2020); *Nw. Immigr. Rts. Project v. USCIS*, 496 F. Supp. 3d 31, 69-70 (D.D.C. 2020); *Pangea*, 512 F. Supp. 3d at 975.

Resigning, DHS Official Says, CNN Politics (Jan. 14, 2021), https://www.cnn.com/2021/01/13/politics/acting-ice-director-resigns/index.html.

III. Wolf Approves the Anti-Asylum Rule, Weakening Safeguards Against Persecution and Torture.

At the same time that courts and the Government Accountability Office were ruling that Chad Wolf had no authority to act as the Security of Homeland Security, Wolf exercised the Secretary's powers to approve the Anti-Asylum Rule challenged here.

In June 2020, DHS and DOJ issued a joint notice of proposed rulemaking, laying out dramatic changes to the regulations governing asylum, withholding of removal, and Convention Against Torture protections. *See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (June 15, 2020). Although the proposal changed more than 30 sections of the regulations and spanned 43 pages in the single-spaced, small-type Federal Register, only 30 days were allowed for comments. *Id.* at 36,264.

The final rule was published on December 11, 2020. *See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (Dec. 11, 2020). Despite receiving more than 87,000 comments in the short window provided, DHS and DOJ made "few substantive changes," 85 Fed. Reg. at 80,274, to their initial proposals.

During the rulemaking, commentators objected that Chad Wolf was serving illegally and therefore could not approve the Rule. *Id.* at 80,381. The government offered a paragraph explaining why it disagreed (citing the arguments that courts and the GAO had already uniformly rejected), followed by several paragraphs explaining DHS's subsequent bureaucratic maneuvers to legitimize Wolf's tenure (which courts had also rejected). *See id.* at 80,381-82.

Every change made by the Anti-Asylum Rule makes it more difficult to secure protection from persecution and torture. Among many others, these changes include the following:

- Restricting what qualifies as a "particular social group" whose members are eligible for asylum, and identifying nine categories of groups that generally cannot qualify.
- Mandating that inclusion in a particular social group is forever waived if that group is not initially defined before the immigration judge.
- Sharply narrowing what counts as "persecution."
- Establishing eight categorical bases on which claims of persecution will generally be denied as lacking a nexus to a protected ground.
- Drastically expanding the bar to asylum for individuals resettled in another country.
- Changing the factors used to determine whether an asylum seeker could reasonably relocate within another country instead of seeking protection in the United States.
- Adding nine factors that operate as general bars to asylum.
- Adding three factors considered "significantly adverse" to grants of asylum.
- Significantly narrowing eligibility for relief under the Convention Against Torture.

See Compl. ¶¶ 79-80.

The Rule was signed by Attorney General William Barr and Chad Mizelle, who was ostensibly the "Senior Official Performing the Duties of the General Counsel for DHS." 85 Fed. Reg. at 80,385. Mizelle signed on Wolf's behalf under a delegation of signature authority. *Id.*

PROCEDURAL BACKGROUND

Plaintiffs filed their complaint on January 14, 2021, against DHS, DOJ, and several of their components and officers (together, "Defendants"). The complaint alleged that issuing the Anti-Asylum Rule violated the HSA, the FVRA, and the Appointments Clause, and was *ultra vires*, because Wolf lacked authority to approve the Rule as Acting Secretary of Homeland Security. *See* Compl. ¶¶ 417-33 (first three claims for relief). Plaintiffs also alleged that the Rule violated the Immigration and Nationality Act, the Convention Against Torture, the substantive and procedural requirements of the Administrative Procedure Act, and the Equal

Protection Clause. *See id.* ¶¶ 434-53 (fourth through seventh claims for relief).

On January 8, 2021, a nationwide preliminary injunction enjoining the Rule's implementation was entered by the Northern District of California. *See Pangea*, 512 F. Supp. 3d at 977; Order, *Immigr. Equal. v. DHS*, No. 20-9258 (N.D. Cal. Jan. 8, 2021) (ECF No. 55).

In late January 2021, this Court ordered the parties to confer on whether they anticipated the case would be mooted by the change in presidential administration and whether they wished to stay the case. *See* Minute Order (Jan. 28, 2021). On February 8, 2021, Plaintiffs agreed to a stay to "allow incoming Department leadership time to consider the issues in this case and to review the Rule," Joint Stipulation to Hold Case in Abeyance, at 1 (Feb. 8, 2021) (ECF No. 16), citing President Biden's recent executive order directing DHS and DOJ officials to review various immigration policies, *see* Exec. Order No. 14010, 86 Fed. Reg. 8,267 (Feb. 2, 2021).

This Court then entered a stay. *See* Minute Order (Feb. 9, 2021). In May, the Parties agreed to a continued stay. *See* Joint Status Report (May 7, 2021) (ECF No. 17). The Court ordered the stay continued and requested periodic status reports. Minute Order (May 9, 2021).

In September 2022, after Defendants repeatedly failed to meet their deadlines for issuing notices of proposed rulemakings to rescind or replace the Anti-Asylum Rule, Plaintiffs moved to partially lift the stay. *See* Mot. to Partially Lift Stay of Proceedings (Sept. 23, 2022) (ECF No. 37). The Court denied that motion without prejudice in December 2022, noting that the Court was "troubled by the length of the stay" and permitting Plaintiffs to renew their motion after May 2023 if Defendants had not completed their prospective rulemakings. Minute Order (Dec. 1, 2022). Those prospective rulemakings failed to materialize, and in June 2023, the Court held a status hearing, at which Defendants no longer represented that the rulemakings were a "priority," advising instead that the Departments had "many competing priorities" but would "continue to

work on the rulemakings." Transcript of Status Hearing, at 4:2-4 (June 2, 2023). The Court allowed Plaintiffs to file a renewed motion to lift the stay. *See* Minute Order (June 2, 2023).

In July 2023, Plaintiffs filed their renewed motion to partially lift the stay and proceed on Counts 1 to 3 of their Complaint, which allege that the Anti-Asylum Rule must be vacated because Chad Wolf had no authority to issue it. *See* Pls.' Renewed Mot. to Partially Lift Stay (July 14, 2023) (ECF No. 47). The Court granted that motion in March 2024, explaining in part that "Plaintiffs have established that continuing the stay would harm their missions and threaten their continued funding and functioning." Mem. Op. & Order at 9 (Mar. 4, 2024) (ECF No. 54).

STANDARD OF REVIEW

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material if it might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Steele v. Schafer*, 535 F.3d 689, 692 (D.C. Cir. 2008) (quotation marks omitted). Courts must draw reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Summary judgment should be granted unless "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Stoe v. Barr*, 960 F.3d 627, 638 (D.C. Cir. 2020) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

Plaintiffs' first, second, and third claims for relief turn on the meaning of publicly available DHS orders and regulations, and on the interpretation of the HSA, the FVRA, and the Appointments Clause. These claims present issues of law amenable to summary disposition.

See Asylumworks, 590 F. Supp. 3d at 13 (granting summary judgment to plaintiffs based on Chad Wolf's unlawful appointment); *Batalla Vidal*, 501 F. Supp. 3d at 123 (same); *L.M.-M.*, 442 F. Supp. 3d at 37 (granting summary judgment on FVRA claim); *Bullock v. U.S. Bureau of Land Mgmt.*, 489 F. Supp. 3d 1112, 1131 (D. Mont. 2020) (same).

ARGUMENT

The Anti-Asylum Rule is unlawful and unconstitutional because the purported Acting Secretary of Homeland Security who approved it, Chad Wolf, had no authority to exercise that power under the HSA, the FVRA, or the Appointments Clause. Because Wolf was never validly Acting Secretary, he lacked authority to wield the Secretary's rulemaking powers. His approval of the Rule must therefore be vacated under the APA and held void under the FVRA.

I. The Anti-Asylum Rule Is Unlawful.

A. The Rule's Issuance Violated the HSA.

Chad Wolf approved the Anti-Asylum Rule based on his purported status as Acting Secretary of Homeland Security under the HSA. *See* 85 Fed. Reg. at 80,381-82. But as every court to address the matter has concluded, Wolf was never lawfully Acting Secretary. His appointment violated the HSA in two ways. First, he was installed as Acting Secretary by Kevin McAleenan, whose own tenure violated the HSA because it contradicted the order of succession for the Secretary's office under 6 U.S.C. § 113(g)(2). Second, even if McAleenan had lawfully been Acting Secretary, his order making Wolf his successor was invalid because only a Senate-confirmed Secretary, not an Acting Secretary, may designate an order of succession.

1. Because McAleenan Was Not Lawfully the Acting Secretary of DHS, He Could Not Make Wolf His Successor.

Chad Wolf ostensibly became Acting Secretary under a succession order issued by his predecessor, Kevin McAleenan, in November 2019. *See* 85 Fed. Reg. at 80,381. But

McAleenan's order was invalid because his own tenure as Acting Secretary violated the HSA.

DHS's "further order of succession" for the Secretary's office, 6 U.S.C. § 113(g)(2), prohibited McAleenan from becoming Acting Secretary when the office became vacant in April 2019, because other officials higher in the line of succession were available to serve. By skipping ahead of them and deviating from the order of succession, McAleenan violated § 113(g)(2). And because he was never lawfully Acting Secretary, his later attempt to establish a new order of succession—elevating Wolf to replace him—was a nullity. Every court to resolve the matter, along with the GAO, has agreed that McAleenan was an unlawful Acting Secretary, rendering Wolf's tenure unlawful as well. *See supra* at 13 n.1.

As explained above, the HSA prescribes a line of succession when the Secretary's office is vacant. By default, the Deputy Secretary automatically becomes Acting Secretary. 6 U.S.C. § 113(a)(1)(A). If there is no Deputy Secretary, the Under Secretary for Management automatically serves instead. *Id.* § 113(g)(1). To prepare for situations in which both positions are vacant, the Secretary may designate "other officers of the Department in further order of succession to serve as Acting Secretary." *Id.* § 113(g)(2).

Exercising that power, DHS Secretaries have designated this further order of succession in Delegation 106. *See* DHS Delegation 106 (Revision 8), *supra*, § II (Dec. 15, 2016); *CASA de Md.*, 486 F. Supp. 3d at 957 (describing Delegation 106 as the "repository for changes to the order of succession for the office of the Secretary and twenty-eight other [Senate-confirmed] positions"). In 2019, Delegation 106 had different lines of succession for two different scenarios in which the Secretary's office became vacant—a standard scenario and an emergency scenario.

In the standard scenario, when vacancies were caused by a Secretary's resignation, death, or inability to serve, Delegation 106 incorporated the line of succession in Executive Order

13753. *See* DHS Delegation 106 (Revision 8.4), *supra*, § II.A (Feb. 15, 2019). In the emergency scenario, when vacancies were caused by disasters or emergencies, Delegation 106 provided a different line of succession, set forth in its Annex A. *See id.* § II.B. Since 2016, when § 113(g)(2) was added to the HSA—thereby empowering Secretaries to designate a further order of succession—updates to Delegation 106 consistently preserved this "bifurcated structure," *Asylumworks*, 590 F. Supp. 3d at 15, in which Executive Order 13753 governed vacancies caused by resignations while Annex A governed vacancies caused by emergencies.

DHS Secretary Kirstjen Nielsen resigned in April 2019. Before leaving, she approved a revision to the line of succession for the Secretary's office. *See* Nielsen Order, *supra*. Her changes, however, affected only the emergency scenario. Nielsen ordered that Annex A be replaced with a new list of officials, but she approved no other changes to Delegation 106 and did not disturb its two-track system under which vacancies caused by resignations were governed by Executive Order 13753. Her order reads: "I hereby designate the order of succession for the Secretary of Homeland Security *as follows*." *Id.* at 2 (emphasis added). The only thing that "follows" is a revision to Annex A's text: "Annex A of . . . Delegation No. 00106, is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof." *Id.* Appearing below that is a new Annex A with a reordered list of officials. *See id.*

Delegation 106 was then updated accordingly, on Nielsen's last day in office. Consistent with her order, the text of Annex A was replaced with a revised list of officials. *See* DHS Delegation 106 (Revision 8.5), *supra*, Annex A (Apr. 10, 2019). Also consistent with her order, Annex A continued to govern only the emergency scenario. *See id.* § II.B. Vacancies following "the Secretary's . . . resignation" were still "governed by Executive Order 13753." *Id.* § II.A.

In other words, "under the plain terms of Delegation 106, Annex A *only* provided the

succession order in the event of a natural disaster or other emergency." *Asylumworks*, 590 F. Supp. 3d at 16. Nielsen's order "'did not change when Annex A, rather than E.O. 13753, governed,' and E.O. 13753 still dictated the order of succession upon the Secretary's resignation." *Id.* (quoting *Batalla Vidal*, 501 F. Supp. 3d at 125).

When Nielsen left office, therefore, the standard scenario applied. Under Delegation 106, vacancies arising from resignations were still governed by Section II.A, which cross-referenced Executive Order 13753. The top available official listed in the executive order was Christopher Krebs, the Under Secretary for National Protection and Programs. He should have become the Acting Secretary when Nielsen resigned. *Asylumworks*, 590 F. Supp. 3d at 16.

Because Kevin McAleenan was then the Commissioner of U.S. Customs and Border Protection, he was *seventh* in line to become Acting Secretary following Nielsen's resignation. Although Krebs and another official who was also higher in the line of succession than McAleenan were both available to serve, McAleenan took over as Acting Secretary. In doing so, he violated the HSA by deviating from the Department's "further order of succession." 6 U.S.C. § 113(g)(2); *see Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 533 ("Pursuant to that order of succession, Mr. McAleenan was seventh in line and, thus, was not eligible to assume the role of Acting Secretary."); *CASA de Md.*, 486 F. Supp. 3d at 958 ("McAleenan's leapfrogging over Director Krebs therefore violated the agency's own order of succession.").

Defending McAleenan's tenure, the government has insisted that Nielsen's order "meant something other than what it says." *Batalla Vidal*, 501 F. Supp. 3d at 132. According to the government, Nielsen's order changed the entire function of Annex A, so that its line of succession now "applied to any vacancy," not just the emergency scenario, and thus "superseded . . . the order of succession found in Executive Order 13753." 85 Fed. Reg. at 80,381. Because

McAleenan was the highest-listed official in Annex A who was available when Nielsen resigned, the government maintains that he became Acting Secretary pursuant to Nielsen's order. *See id.*

Every court to address this argument has rightly rejected it. Nielsen's order plainly states that it authorizes only one change to Delegation 106: revising Annex A. *See* Nielsen Order, *supra*, at 1 (memorializing Nielsen's "approval of the attached document," identified as "Annex A"); *id.* at 2 ("Annex A . . . is hereby amended by striking the text of such Annex in its entirety and inserting the following"). When Nielsen signed her order, Annex A had *never* supplied the line of succession for resignations. Instead, it exclusively governed emergencies. *See, e.g.*, DHS Delegation 106 (Revision 8), *supra*, § II (Dec. 15, 2016); DHS Delegation 106 (Revision 8.4), *supra*, § II.B (Feb. 15, 2019). Nothing in Nielsen's order purported to change that. *See CASA de Md.*, 486 F. Supp. 3d at 958 (Nielsen "amended Annex A of Delegation Order 000106, which applied only to succession 'in the event of disaster or emergency'"); *Asylumworks*, 590 F. Supp. 3d at 20 (Nielsen "left unchanged the order of succession in case of the Secretary's resignation, which remained subject to the terms of E.O. 13753").

The government has tried to explain this away as a bureaucratic error that failed to implement Nielsen's order correctly. But DHS did exactly what Nielsen ordered: it "replaced Annex A and made no other changes to Delegation No. 00106." *La Clínica*, 2020 WL 6940934, at *13. Thus, when Nielsen resigned, "the orderly succession of officials [was] governed by Executive Order 13753 . . . not the amended Annex A, which only applied when the Secretary was unavailable due to disaster or catastrophic emergency." *Id.* (quotation marks omitted).

Nielsen's order, in other words, "meant what it said." *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 534. Her order and the subsequently revised Delegation 106 are consistent with each other and perfectly clear: Nielsen altered the line of succession only for emergencies, not for

resignations. *See Pangea*, 512 F. Supp. 3d at 974 (Nielsen's "unambiguous" order "changed only Annex A, which was the order of succession to be used to determine who would perform the duties of Secretary in the event of a disaster or emergency . . . . It did not address what should happen in the event of resignations . . . ."); *CASA de Md.*, 486 F. Supp. 3d at 959 (refusing to read Nielsen's order "to also apply in the case of resignation," given "its clear language limiting application to disaster and emergency").

Illustrating that point, when Kevin McAleenan himself purported to establish a new order of succession under § 113(g)(2) seven months later, he made the very change that the government has ascribed to Nielsen. "Doing what Secretary Nielsen had failed to do before her resignation," *Asylumworks*, 590 F. Supp. 3d at 17, McAleenan altered the line of succession for vacancies caused by resignations—eschewing any further reliance on Executive Order 13753 in favor of exclusive reliance on Annex A, which now governed both scenarios: "Section II.A of DHS Delegation No. 00106 . . . is amended hereby to state as follows: 'In case of the Secretary's . . . resignation, . . . the order of succession of officials *is governed by Annex A*.'" Order, Kevin K. McAleenan, Acting Secretary of Homeland Security, *Amendment to the Order of Succession for the Secretary of Homeland Security*, at 1 (Nov. 8, 2019) (emphasis added).

Delegation 106 was then changed accordingly. *See* DHS Delegation 106 (Revision 8.6), *supra*, § II.A (Nov. 14, 2019). In making that change, DHS was not belatedly fixing a mistake it made seven months earlier, but rather implementing McAleenan's new and different order.

As the record plainly shows, therefore, "McAleenan amended Delegation No. 00106 . . . to cross-reference Annex A but Nielsen did not." *La Clínica*, 2020 WL 6940934, at *14. The government has never explained "why it was necessary for Mr. McAleenan to amend Section II.A of Delegation 00106, if Secretary Nielsen had already accomplished that change."

Immigrant Legal Res. Ctr., 491 F. Supp. 3d at 535; *see Asylumworks*, 590 F. Supp. 3d at 21.

Despite the plain language of Nielsen's order, the government has argued that she *must* have been establishing a consolidated line of succession to govern "any vacancy," 85 Fed. Reg. at 80,381, because she invoked the Secretary's power under 6 U.S.C. § 113(g)(2) to designate an "order of succession." But Nielsen's reliance on her HSA authority "at best states the obvious—that Nielsen had the authority to change the succession order as applied to the office of the Secretary," not that she "changed two separate succession lists applicable to each scenario." *CASA de Md.*, 486 F. Supp. 3d at 959.

Simply put, the government's interpretation requires adding text to Nielsen's order that it does not contain (specifying that she was amending Delegation 106 to create a single line of succession for all vacancies), while ignoring text that the order *does* contain (specifying that the only change being made to Delegation 106 was to replace Annex A).

Because Nielsen did not change the line of succession for resignations, McAleenan was not entitled to become Acting Secretary under 6 U.S.C. § 113 when Nielsen resigned. No other authority permitted him to do so either: the government has acknowledged that "the President did not appoint McAleenan pursuant to the FVRA." *La Clínica*, 2020 WL 6940934, at *14. Thus, "McAleenan was not properly serving as the Acting Secretary." *Behring*, 544 F. Supp. 3d at 944.

"This necessarily voids McAleenan's later, November 2019 revision to Delegation 106 allowing Wolf to become Acting Secretary." *Asylumworks*, 590 F. Supp. 3d at 19. Chad Wolf's elevation to Acting Secretary rested entirely on that November 2019 order. *See* 85 Fed. Reg. at 80,381. Because only "the Secretary" may designate an order of succession, *see* 6 U.S.C. § 113(g)(2), "McAleenan did not have the authority to amend the Secretary's existing designation," *Behring*, 544 F. Supp. 3d at 944 (quoting GAO Decision, *supra*, at 10). His order

was thus invalid under the APA, 5 U.S.C. § 706(2)(A), (C), and void under the FVRA, 5 U.S.C. § 3348(d)(1). "Because the passing of the torch from Nielsen to McAleenan was ineffective, the attempt by McAleenan to pass it in turn to Wolf had no legal effect whatsoever." *Pangea*, 512 F. Supp. 3d at 974. Wolf never lawfully became the Acting Secretary.

2. Because an Acting Secretary Cannot Designate an Order of Succession, McAleenan Could Not Make Wolf His Successor.

Even if Kevin McAleenan had been a legitimate Acting Secretary, he still would have lacked power to make Chad Wolf his successor under the HSA. Only a Senate-confirmed Secretary, not an *Acting* Secretary, may designate an order of succession under 6 U.S.C. § 113(g)(2). That result follows from "the text, structure, and purpose of the statute," and it avoids "serious" constitutional concerns. *Nw. Immigr. Rts. Project*, 496 F. Supp. 3d at 69.

As described earlier, the FVRA is normally "the exclusive means" for authorizing "the functions and duties" of a vacant office to be performed. 5 U.S.C. § 3347(a). There is an exception for recess appointments and another for statutes that name a specific official to fill a vacancy. *Id.* § 3347(a)(1)(B), (2). Otherwise, deviations from the FVRA are permitted only where a statute "expressly" authorizes the head of a department to designate someone to fill a vacancy. *Id.* § 3347(a)(1)(A). The HSA does not expressly provide that authority to Acting Secretaries. And the Constitution might not permit it if it did.

Although an acting officer typically "is vested with the same authority that could be exercised by the officer for whom he acts," *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019), the HSA treats orders of succession under § 113(g)(2) differently. That provision empowers Secretaries to designate a further order of succession, but it distinguishes "the Secretary" from an "Acting Secretary," 6 U.S.C. § 113(g)(2), and it does not "expressly" give Acting Secretaries the same authority it gives to Secretaries. *See Mohamad v. Palestinian*

Auth., 566 U.S. 449, 456 (2012) ("We generally seek to respect Congress' decision to use different terms to describe different categories of people or things.").

In other statutes, Congress has expressly authorized a "secretary *or* acting secretary" to perform functions. 25 U.S.C. § 199a (emphasis added).[2] If Congress meant to allow Acting Secretaries of Homeland Security to establish orders of succession under § 113(g)(2), it could have used similar language in the HSA. It did not. The HSA, therefore, does not "expressly" authorize Acting Secretaries to perform this function. 5 U.S.C. § 3347(a)(1). So even if McAleenan were a valid Acting Secretary, his order of succession could not displace the FVRA.

The HSA's relationship to the FVRA buttresses this conclusion. The authority to establish orders of succession is a carveout from the FVRA. *See* 6 U.S.C. § 113(g)(2) (permitting further orders of succession "[n]otwithstanding" the FVRA). Without this carveout, the FVRA would permit only the Secretary's "first assistant" (the Deputy Secretary) to become Acting Secretary automatically. 5 U.S.C. § 3345(a)(1). The breadth of this carveout should therefore be construed in light of the structure and purpose of the FVRA as well as the HSA. *Cf. Nw. Immigr. Rts. Project*, 496 F. Supp. 3d at 62 ("the Court must decide how big an exception to the FVRA Congress created"). That insight reinforces the need to distinguish "the Secretary" from an "Acting Secretary" in § 113(g)(2).

The FVRA sharply limits the exceptions to its "first assistant" rule. It allows "the President (and only the President)" to direct someone besides the first assistant to serve as an

[2] *See, e.g.*, 8 U.S.C. § 1182(n)(2)(G)(i) ("the Secretary of Labor . . . or the acting Secretary"); 21 U.S.C. § 355(e) ("the Secretary . . . or in his absence the officer acting as Secretary"); 5 U.S.C. § 8402(c)(4) ("The Director or Acting Director"); 15 U.S.C. § 782(a) ("the Administrator, or acting Administrator"); 30 U.S.C. § 1724(d)(2)(B)(i) ("an Assistant Secretary of the Interior or an Acting Assistant Secretary"); 42 U.S.C. § 2000a-5(b) ("the chief judge . . . or in his absence, the acting chief judge"); 50 U.S.C. § 1885a(e) ("the Attorney General . . . or Acting Attorney General").

acting officer. 5 U.S.C. § 3345(a)(2), (3). "The HSA creates an exception to this rule that allows the Secretary (and not 'only the President') to establish an order of succession as well." *Nw. Immigr. Rts. Project*, 496 F. Supp. 3d at 62. "If the provision refers only to a [Senate-confirmed] Secretary, then it is a narrow exception," but if the provision "is read to include an Acting Secretary, that would make the exception much more capacious." *Id.* Indeed, "the Secretary could designate the lowest-ranking 'officer' in any office or agency within the Department to serve as Acting Secretary, and once in office, that Acting Secretary could amend the Department's order of succession to name other low-ranking 'officers' to succeed him." *Id.* at 62-63. That would "permit any officer in the Department . . . to fill the role ordinarily reserved to the President (and only the President)." *Id.* (quotation marks omitted).

Congress had no reason to permit such a sweeping deviation from the FVRA. The reason Secretaries are allowed to establish orders of succession is to prevent even brief leadership gaps at DHS, a critical department that protects the nation from security threats. By allowing designated officers to step into the Secretary's role automatically and without delay when unexpected vacancies arise, the HSA ensures seamless continuity, avoiding the need for the President to quickly identify and formally select an eligible official to take over. *See* 5 U.S.C. § 3345(a). That purpose—avoiding delays that could imperil national security—is not served by permitting Acting Secretaries to change the line of succession mid-vacancy simply to elevate their preferred successors above the officers already designated by the former Secretary.

Finally, permitting Acting Secretaries to designate future Acting Secretaries would run headlong into "serious" constitutional problems. *Nw. Immigr. Rts. Project*, 496 F. Supp. 3d at 69. Acting officials who temporarily fill vacant principal offices are likely "inferior" officers under the Constitution. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 22 (2021) (explaining that

"an inferior officer can perform functions of [a] principal office on [an] acting basis" (citing *United States v. Eaton*, 169 U.S. 331, 343 (1898)); *accord Edmond*, 520 U.S. at 661. If acting officials are inferior (not principal) officers, Congress may assign their appointment—without Senate confirmation—to "the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

But allowing an Acting Secretary (like Kevin McAleenan) to appoint another Acting Secretary (like Chad Wolf) may violate Article II, because it would allow an inferior officer to appoint another inferior officer. *See Nw. Immigr. Rts. Project*, 496 F. Supp. 3d at 63-69; *Weiss v. United States*, 510 U.S. 163, 196 (1994) (Scalia, J., concurring) (a statute violates the Appointments Clause if it "effectively lodges appointment power in any person other than those whom the Constitution specifies"). This arrangement would be constitutional only if Acting Secretaries are "Heads of Departments" under Article II, and thus may be given the power to appoint inferior officers. But among the difficulties with this position is that an Acting Secretary might not even hold a Senate-confirmed position. *Compare* 6 U.S.C. § 113(g)(2) (permitting any "officers of the Department" to become Acting Secretary under a further order of succession), *with id.* § 113(b), (c), (d) (establishing various "officers" of the Department who are not Senate-confirmed); *see also* 5 U.S.C. § 3345(a)(3) (permitting Presidents to designate certain "employees" as acting officers under the FVRA). Thus, a mere agency employee would have the power to appoint "Officers of the United States." U.S. Const. art. II, § 2, cl. 2.

These Article II concerns can be avoided by reading the HSA as giving appointment power only to "the Secretary," not an "Acting Secretary." 6 U.S.C. § 113(g)(2). And that reading best comports with the statute's text, structure, and relationship to the FVRA.

Because an Acting Secretary cannot designate an order of succession under § 113(g)(2), McAleenan's attempt to do so in November 2019 violated the HSA and had no effect.

B. The Rule's Issuance Violated the FVRA.

In addition to violating the HSA, Chad Wolf's approval of the Anti-Asylum Rule violated the restrictions on acting service in the FVRA. First, Wolf's appointment violated the FVRA's rules about *who* may fill a vacant office. Because Wolf had no authority to be Acting Secretary under the HSA or any other statute, his performance of the Secretary's "functions and duties" was illegal under the FVRA. 5 U.S.C. § 3347(a). Second, and independently, Wolf's appointment violated the FVRA's limits on *how long* acting officials may fill a vacant office. Even if Kevin McAleenan had originally been a valid Acting Secretary, the FVRA's time limits on acting service ran out before McAleenan signed the order making Wolf his successor.

1. Because No Statute Authorized Wolf to Be Acting Secretary, His Appointment Violated the FVRA.

As explained above, Chad Wolf assumed the role of Acting Secretary without the authority of a legitimate order of succession under 6 U.S.C. § 113(g)(2). His appointment was therefore unauthorized by the HSA. Accordingly, the question of who could fill the Secretary's office was governed by the FVRA. And because Wolf's appointment did not comply with those rules, he violated the FVRA by exercising the Secretary's functions and duties.

The FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office" requiring Senate confirmation, 5 U.S.C. § 3347(a), unless one of three exceptions applies. Two of those exceptions are irrelevant here. The President did not appoint Wolf as Secretary through a recess appointment. *Id.* § 3347(a)(2). Nor did any statute "expressly . . . designate[]" Wolf, or the person occupying his position, "to perform the functions and duties of [the Secretary] in an acting capacity." *Id.* § 3347(a)(1)(B); *cf.* 6 U.S.C. § 113(g)(1) (providing an example of an express statutory designation).

The government has defended Wolf's tenure under the third exception. Appointments to

acting service may deviate from the FVRA if a statute "expressly . . . authorizes . . . the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* § 3347(a)(1)(A). This exception makes room for statutes like 6 U.S.C. § 113(g)(2), which authorizes the head of the Homeland Security Department to designate an "order of succession" governing vacancies in the Secretary's office. *Id.* As shown above, however, Wolf's appointment was not authorized by § 113(g)(2) because it did not comply with a valid order of succession. This third and final exception, therefore, is unavailing as well.

The FVRA prescribes that unless someone is performing the functions and duties of a vacant office in accordance with its terms, "the office shall remain vacant." 5 U.S.C. § 3348(b)(1). When the office in question is "the head of an Executive agency" like the DHS Secretary, no one may "perform any function or duty of such office." *Id.* § 3348(b)(2).

Because Wolf assumed the role of Acting Secretary without authorization from the FVRA, *see* 5 U.S.C. § 3345, or any alternative statute like the HSA, *see id.* § 3347(a), he violated the FVRA when he performed the "functions and duties" of the office, *id.* His tenure therefore violated not just the HSA, but also the FVRA. *Asylumworks*, 590 F. Supp. 3d at 21-22.

2. Because the FVRA's Time Limits Expired Before McAleenan Revised the Order of Succession, Wolf's Appointment Violated the FVRA.

Even if Kevin McAleenan lawfully became Acting Secretary in April 2019, and even if an Acting Secretary may designate an order of succession under 6 U.S.C. § 113(g)(2), Wolf's appointment *still* was illegal. By the time McAleenan signed his order elevating Wolf, his own authority had expired. For this independent reason, Wolf's appointment violated the FVRA.

The FVRA permits acting service "for no longer than 210 days beginning on the date the vacancy occurs," unless the President submits a Senate nomination. 5 U.S.C. § 3346(a). The

Secretary's office became vacant on April 10, 2019, and President Trump did not nominate a new Secretary until the following year. Accordingly, the FVRA's time limits expired on November 6, 2019—before McAleenan issued his succession order. The order was thus void. Once the FVRA's time limits have been exhausted, "the office shall remain vacant." *Id.* § 3348(b)(1). Actions taken after that point "shall have no force or effect." *Id.* § 3348(d)(1).

Contrary to the government's position, the FVRA's time limits apply to an Acting Secretary who gained that position through an order of succession under 6 U.S.C. § 113(g)(2). The FVRA's time limits restrict anyone who is "serving as an acting officer as described under section 3345." 5 U.S.C. § 3346(a). That is, they apply to anyone who "perform[s] the functions and duties of [an] office temporarily in an acting capacity." *Id.* § 3345(a). A person who serves as Acting Secretary under the HSA meets that description: he or she "perform[s] the functions and duties of [the Secretary's] office temporarily in an acting capacity." *Id.*

The FVRA does not restrict its time limits to officials "serving as an acting officer *pursuant to* section 3345." Nor to officials "serving as an acting officer *under* section 3345." Rather, these limits apply to officials "serving as an acting officer *as described under* section 3345." 5 U.S.C. § 3346(a) (emphasis added). Congress used that language to ensure that the FVRA's time limits govern everyone who "perform[s] the functions and duties of [an] office temporarily in an acting capacity," *id.* § 3345(a), regardless of whether the agency chooses to label that person an "acting officer." Before the FVRA's passage, agencies were increasingly trying to circumvent the limits of the Vacancies Act by delegating the authority of vacant offices to other agency officials without calling those individuals "acting officers." *See supra* at 5-6; S. Rep. No. 105-250, *supra*, at 5-6, 12. The FVRA's choice of language in § 3346(a) precludes that tactic, by applying the statute's time limits to anyone who "perform[s] the functions and

duties of [an] office temporarily in an acting capacity," *id.* § 3345(a), no matter what title they are given.[3]

In any event, even if the FVRA's time limits applied only to individuals serving as acting officers "pursuant to" § 3345, those time limits still would apply here. Acting Secretaries of DHS who gain their positions under 6 U.S.C. § 113(g) are indeed serving pursuant to § 3345, which the HSA incorporates as its means of authorizing acting service. Specifically, 6 U.S.C. § 113(a)(1)(A) makes the Deputy Secretary the "first assistant" to the Secretary "for purposes of subchapter III of chapter 33 of Title 5," *i.e.*, the FVRA. Subsection (g)(1) extends this "first assistant" rule one step further: if no Deputy is available, the Under Secretary for Management fills that role. And if no Under Secretary is available either, the baton passes to the officers listed in the "further order of succession" designated under § 113(g)(2).

In short, a further order of succession adopted under § 113(g)(2) is an extension of the "first assistant" rule of 5 U.S.C. § 3345. The HSA simply modifies that rule by permitting a series of officers, not just one, to play the role of "first assistant" during a vacancy. Someone who becomes Acting Secretary under the Department's further order of succession is therefore "serving as an acting officer as described under section 3345." 5 U.S.C. § 3346(a).

The FVRA's time limits therefore apply, and the HSA does not displace them. Statutes like § 113(g)(2) modify the FVRA's rules only if they "expressly" authorize a department head "to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1)(A). Otherwise, the FVRA (with its

[3] An example of the kind of circumvention-through-labels that Congress sought to prevent is evident in this case. When the Anti-Asylum Rule was issued in 2020, DHS was trying to evade the FVRA's time limits by labelling Chad Mizelle the "Senior Official Performing the Duties of the General Counsel," 85 Fed. Reg. at 80,385, rather than the "Acting General Counsel."

time limits) remains "the exclusive means" for permitting acting service. *Id.* § 3347(a).

Nothing in the HSA allows the designation of Acting Secretaries who may serve beyond the FVRA's time limits, and certainly nothing does so "expressly." Section 113(g)(2) departs from the FVRA only with respect to *who* may serve as Acting Secretary. It does not address *how long* these officers may serve. And Congress knows how to address such matters. *See, e.g.*, 12 U.S.C. § 5491(c)(2) (permitting acting officer to serve "until a successor has been appointed").

There is no conflict, therefore, between the FVRA's time limits and § 113(g)(2). Both statutes can be given their full textual force. Thus, it is irrelevant that the HSA permits the Secretary to establish a further order of succession "[n]otwithstanding" the FVRA. 6 U.S.C. § 113(g)(2). A "notwithstanding" clause "just shows which of two or more provisions prevails *in the event of a conflict*." *SW Gen.*, 580 U.S. at 302 (emphasis added); *id.* at 301 (the word "shows which provision prevails in the event of a clash" (quotation marks omitted)). Because there is no conflict between § 113(g)(2) and the FVRA's time limits, the "notwithstanding" clause does not override those time limits. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (quotation marks omitted)).[4]

Permitting officials to "serve[] as Acting Secretary without time limitation," 85 Fed. Reg. at 80,381, as the government has urged, would also violate the Constitution. The temporary

[4] The "notwithstanding" clause resolves a separate question on which the statutes actually conflict. The FVRA permits only one official to serve automatically under its "first assistant" rule, requiring presidential intervention before anyone else can fill the office. *See* 5 U.S.C. § 3345(a). In contrast, the HSA permits multiple officials to fill the Secretary's office automatically. *See* 6 U.S.C. § 113(g). Because these rules conflict with each other, the "notwithstanding" clause clarifies "which provision prevails." *SW Gen.*, 580 U.S. at 301 (quotation marks omitted).

nature of acting service is what reconciles it with the Appointments Clause. *See Eaton*, 169 U.S. at 343 (permitting acting service under "temporary conditions"). But according to the government, DHS may operate indefinitely without ever having a Senate-confirmed Secretary. If no time limits apply and succession orders under § 113(g)(2) may be modified at will, a series of Acting Secretaries can run the Department in perpetuity. Each can choose his own successor as long as the Department's top positions remain vacant. Before leaving office, a departing Acting Secretary simply must revise the order of succession, as McAleenan did, to move his chosen replacement to the top of the list. And the people making up this chain of Acting Secretaries need not have been confirmed by the Senate to *any* office in DHS, because nothing in § 113(g)(2) restricts succession orders to the Department's Senate-confirmed officers. In short, a self-perpetuating sequence of Acting Secretaries could run the Department indefinitely.

That scenario not only flouts the Appointments Clause but also leads to absurd results that the HSA cannot have intended. The Senate-confirmed Deputy Secretary is unquestionably bound by the FVRA's time limits when serving as Acting Secretary. *See* 6 U.S.C. § 113(a)(1)(A) (making the Deputy Secretary the "first assistant" for FVRA purposes, with no "notwithstanding" clause). According to the government, however, lower-level officers chosen unilaterally by the Department without Senate confirmation may serve as Acting Secretary "without time limitation." 85 Fed. Reg. at 80,381. Indeed, a Deputy Secretary who stops being Acting Secretary when the FVRA's time limits expire would have to turn over the reins to whatever subordinate officer is listed next in the "further order of succession" under § 113(g)(2). That person could then serve as Acting Secretary indefinitely, outranking the Deputy Secretary.

The statutory text does not call for such absurdities, or the constitutional quagmire they would generate. Nothing in § 113(g) purports to override the FVRA's time limits in 5 U.S.C.

§ 3346. Those limits therefore applied to McAleenan. Even if he was a valid Acting Secretary at the outset, his authority expired before he tried to make Wolf his successor.

C. The Rule's Issuance Violated the Appointments Clause.

Because Chad Wolf had no statutory authority to exercise the Secretary's powers, and because he was not confirmed by the Senate to that office, his approval of the Anti-Asylum Rule violated the Appointments Clause. More than "a matter of etiquette or protocol," *Edmond*, 520 U.S. at 659 (quotation marks omitted), the Clause ensures that those who help wield the executive power are subject to the restraining check of Senate confirmation. Constitutional text and history make clear that the executive branch lacks inherent authority to fill vacant offices temporarily. Thus, when a person exercises the powers of a vacant office without Senate confirmation or statutory authorization, as Wolf did, it violates the Appointments Clause. *See Bullock*, 489 F. Supp. 3d at 1128-29.

The Constitution does not allow the executive to temporarily fill vacancies without Senate confirmation, except through recess appointments. *See* U.S. Const. art. II, § 2, cl. 3. Instead, the power to fill vacancies depends on legislation. Without statutory authorization, the executive branch may not direct the duties of vacant offices to be temporarily performed. *See Appointments Ad Interim.*, 16 U.S. Op. Att'y Gen. 596, 597 (1880). Since the founding, therefore, "Congress *has given* the President limited authority to appoint acting officials." *SW Gen.*, 580 U.S. at 294 (emphasis added); *see, e.g.*, Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29; Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415. But in the absence of such legislation, "the duties of the vacant office" must "go unperformed." *SW Gen.*, 580 U.S. at 294.

The Secretary of Homeland Security is a principal officer of the United States whose appointment requires Senate confirmation. 6 U.S.C. § 112(a)(1). As shown above, Chad Wolf

had no statutory authority to wield the powers of that office during a vacancy. Nor was he confirmed by the Senate or installed through a recess appointment. Wolf's use of the Secretary's powers to approve the Anti-Asylum Rule therefore violated the Appointments Clause.

D. The Rule's Issuance Was *Ultra Vires*.

Because Wolf held the position of Acting Secretary without constitutional or statutory authority, his approval of the Anti-Asylum Rule was *ultra vires*. Courts may remedy *ultra vires* actions under their inherent equitable power to grant prospective relief from injuries caused by officials who exceed their authority.

Equitable relief "is traditionally available to enforce federal law" and "reflects a long history of judicial review of illegal executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329, 327 (2015). This authority was conferred on the federal courts by the Constitution, *see* U.S. Const. art. III, § 2, cl. 1, and the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. As a result, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *see Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (when "an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief"). Indeed, from the nation's earliest days, federal courts have used their equitable powers to review the actions of executive branch officials that were alleged to be "beyond their statutory and constitutional powers." *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981); *see, e.g.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010); *Franklin v. Massachusetts*, 505 U.S. 788, 803-06 (1992); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583-84 (1952); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 623-24 (1838).

Because Wolf's approval of the Anti-Asylum Rule exceeded his statutory and

constitutional authority, it was *ultra vires* and is subject to prospective judicial relief.

II. The Rule Harms Plaintiffs, Who Have Standing to Challenge It.

Like an individual plaintiff, organizations have standing to contest illegal action if they can show "actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). An organization suffers an injury in fact when unlawful action "injured the plaintiff's interest in promoting its mission," and "the plaintiff used its resources to counteract that injury." *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011). Cognizable injuries may be either "actual or threatened." *Id.* at 24; *see FEC v. Cruz*, 596 U.S. 289, 297 (2022) ("an injury resulting from the application *or threatened application* of an unlawful enactment").

Thus, an organization may establish Article III standing if the defendant's actions have caused, or threaten to cause, a "concrete and demonstrable injury to the organization's activities" that is "more than simply a setback to the organization's abstract social interests." *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017) (quotation marks omitted). "Even a small injury may suffice to support standing," so long as it is "concrete and particularized and actual or imminent." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 990 (D.C. Cir. 2021) (quotation marks omitted). Those standards are easily satisfied here.

Plaintiff Tahirih is a national nonprofit organization that provides free holistic services to immigrants fleeing gender-based violence who seek legal immigration status under U.S. law, including immigrants with claims for asylum and related humanitarian relief. SUMF § II.A. Tahirih also provides training to other professionals who assist immigrant survivors of violence, including pro bono attorneys with whom Tahirih co-counsels to represent clients. *Id.*

Plaintiff Ayuda is a non-profit organization that provides legal, social services, and language access support to low-income immigrants in Washington, D.C., Maryland, and Virginia. Ayuda offers free or low-cost legal services to immigrants by representing them in humanitarian-based cases, such as asylum cases, and works with pro bono partners to place cases for representation with law firms. *Id.* § II.B. Ayuda currently has nearly 300 open asylum cases, as well as additional clients for whom asylum is a potential form of relief. *Id.*

As this Court has recognized, promulgation of the Anti-Asylum Rule has already harmed Tahirih and Ayuda's activities and jeopardized their funding, even though the Rule has not yet been implemented due to the preliminary injunction in the Northern District of California.

Representatives from Tahirih and Ayuda submitted declarations last year "setting forth how the Rule has harmed their missions to support asylum-seeking immigrants and to provide low-income immigrants with legal, social, and language services." Mem. Op. & Order at 8 (Mar. 4, 2024) (ECF No. 54). Among other things, those declarations explained how the prospect of the Rule's implementation has increased the time required on each case by Plaintiffs' attorneys, "which in turn reduces the number of service seekers accepted for full representation," *id.* (quoting Tahirih declaration, ECF No. 47-1), and has frustrated Plaintiffs' ability to evaluate potential cases for representation, limiting their "ability to apply for and maintain funding," *id.* at 9 (quoting Ayuda declaration, ECF No. 47-2). "Based on the declarations," this Court held, "Plaintiffs have established that continuing the stay would harm their missions and threaten their continued funding and functioning." *Id.* at 9.

If the Rule's changes to asylum law were actually implemented, the damage to Plaintiffs' activities and finances would be significantly greater. As explained in Plaintiffs' new declarations, the Rule's sweeping restrictions on asylum would likely make it virtually

impossible for a majority of their clients to obtain relief. *See* Decl. of Adilene Nunez Huang ¶¶ 15-16; Decl. of Mayabanza Sylena Bangudi ¶ 21. To cite just one example, the Rule would likely foreclose asylum claims that arise from gender-based persecution. *See* Huang Decl. ¶¶ 23-24, 27-28; Bangudi Decl. ¶¶ 22-24. That change would have a massive impact on Tahirih's clients, all of whom "are survivors of gender-based violence, or family members of those survivors," Huang Decl. ¶ 23, and nearly 40% of whom have asylum claims, *id.* ¶ 10. It would similarly affect Ayuda's clients, many of whom "have asylum cases based on surviving domestic violence, sexual assault, and/or stalking in countries where protections for women and girls are weak or non-existent." Bangudi Decl. ¶ 22. Currently, these clients have viable asylum claims, but under the Rule, those claims could vanish. *See id.*; Huang Decl. ¶¶ 23-24, 27-28.

This example is just one of the Rule's many novel restrictions on asylum relief. *See* Huang Decl. ¶¶ 23-38 (describing how specific portions of the Rule would likely affect specific groups of Tahirih clients); Bangudi Decl. ¶¶ 22-32 (same for Ayuda clients). At a minimum, the Rule would make Plaintiffs' representation of their clients in asylum cases significantly more complicated and time-consuming. *See* Huang Decl. ¶¶ 29, 31-39; Bangudi Decl. ¶¶ 34-35.

That sea change would have numerous cascading effects harming Plaintiffs' activities and requiring a diversion of resources in response. Simply put, "claims for asylum that would have been relatively straightforward . . . will no longer be viable, or will be significantly more complicated. As a result, new asylum cases . . . will be much more time-consuming to pursue." *Id.* ¶ 34; *see also* Huang Decl. ¶¶ 16, 19-20. For example, the Rule's likely ban on gender-based asylum claims would force attorneys "to spend additional time and resources working on the client's case" and would "greatly complicate [Plaintiffs'] work, require new screening and evaluation techniques for [their] case intake procedures, and increase the number of hours that

[their] staff and pro bono network must devote to each asylum case." *Id.* ¶ 23; *see also id.* ¶¶ 29-38 (similar effects from other provisions of the Rule).

Adapting to the Rule would also require Plaintiffs "to spend additional time educating pro bono partners about the many complicated changes in asylum law brought about by the new Rule," including systematically revamping their educational materials. Bangudi Decl. ¶ 36; *see* Huang Decl. ¶ 21. Similarly, Plaintiffs would need to counteract the Rule's impact by spending hours preparing informational presentations to community members "to ensure that both immigrants in the community and partners understood the changes." Bangudi Decl. ¶ 38.

In sum, the Rule's changes would, among other things, "increase the time and resources that [Plaintiffs'] attorneys must spend representing clients in asylum cases, evaluating potential new clients, and training pro bono partners." *Id.* ¶ 33. This "will reduce the number of asylum clients that [they] can represent," Huang Decl. ¶ 22, and divert resources from other priorities, *see id.* ¶¶ 19-20, 22.

These developments would also jeopardize Plaintiffs' funding. *See id.* ¶ 18. By reducing the number of cases that attorneys can responsibly take on, the Rule will impair Plaintiffs' ability to meet goals they committed to achieving when securing grants, which "decreases [the] chances for receiving a grant renewal." Bangudi Decl. ¶ 40. And by diminishing Plaintiffs' ability to obtain meaningful relief for their clients, the Rule puts Plaintiffs at risk of losing competitive grants to other organizations whose work is not affected by changes in asylum eligibility. *Id.* ¶ 41. For Ayuda, which represents paying clients at low cost, the added time and resources would mean that "Ayuda will lose even more revenue on fee paying asylum cases." *Id.* ¶ 42.

Thus, on top of the harms that Plaintiffs already have experienced from the Anti-Asylum Rule's promulgation, *see* Mem. Op. & Order at 9, implementation of the Rule's provisions

would in numerous ways inflict on Plaintiffs a cognizable injury-in-fact: a "concrete and demonstrable injury to [their] activities" with a "consequent drain on [their] resources." *People for Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

III. Plaintiffs Are Entitled to Relief.

A. The Rule Must Be Vacated Under the APA.

Because Chad Wolf had no authority to exercise the powers of the DHS Secretary, his approval of the Anti-Asylum Rule violated the HSA, 6 U.S.C. § 112(a)(3), (e); *id.* § 113(g)(2), the FVRA, 5 U.S.C. §§ 3345-3347, and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The Rule therefore must be vacated as unlawful under the APA.

Wolf's approval of the Rule was an "agency action." 5 U.S.C. § 701(b)(2); *id.* § 551(13). This action was "not in accordance with law," was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," and was "contrary to constitutional . . . power." *Id.* § 706(2)(A), (B), (C). Accordingly, this Court must "hold unlawful and set aside" the Rule. *Id.*

"Vacatur is the normal remedy under the APA" for "unlawful agency action." *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022); *see United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."). Courts follow that "normal course," *id.*, when illegally appointed acting officials purport to authorize agency actions. *E.g.*, *Asylumworks*, 590 F. Supp. 3d at 26; *L.M.-M.*, 442 F. Supp. 3d at 37; *Batalla Vidal*, 2020 WL 7121849, at *1; *Behring*, 544 F. Supp. 3d at 950; *Bullock*, 2020 WL 6204334, at *2. Wolf's unlawful approval of the Anti-Asylum Rule demands the same remedy.

B. The Rule Is Void Under the FVRA.

In addition to setting forth substantive rules about the use of acting officers, *see* 5 U.S.C. §§ 3345-3347, the FVRA has its own penalty provision, *see id.* § 3348. When someone performs "any function or duty" of a vacant office without complying with the FVRA's rules, that action "shall have no force or effect" and "may not be ratified." *Id.* § 3348(d).

The FVRA's penalties are stricter than the APA's. The FVRA retroactively makes illegal actions "void" from the start, not merely "voidable" moving forward. *SW Gen.*, 796 F.3d at 79; *see SW Gen.*, 580 U.S. at 298 n.2 ("actions taken in violation of the FVRA are void *ab initio*"). The FVRA also forecloses ratification of illegal actions, even by validly serving officials. Otherwise, Congress recognized, "no consequence will derive from an illegal acting designation," which would "undermine[] the constitutional requirement of advice and consent." S. Rep. No. 105-250, *supra*, at 8. Finally, the FVRA precludes defenses that the APA makes available like harmless error and the *de facto* officer doctrine. *SW Gen.*, 796 F.3d at 79.

These FVRA penalties apply to "any function or duty of the applicable office that is established by statute and is required by statute to be performed by the applicable officer (and only that officer)." 5 U.S.C. § 3348(a)(2)(A) (punctuation omitted). The rulemaking power that Wolf invoked in approving the Anti-Asylum Rule clearly meets this standard.

The statutes governing the DHS Secretary establish his responsibility over the Department's "issuance of regulations," 6 U.S.C. § 112(e), and they require that "[t]he Secretary . . . shall establish such regulations . . . as he deems necessary for carrying out his authority under the [immigration laws]," 8 U.S.C. § 1103(a)(1), (3). No statute assigns this function or duty to any other officer. Congress has thus required the Secretary—and no one else—to perform it.

As a result, the approval of immigration-related DHS regulations is a function or duty

"required by statute to be performed by the [Secretary] (and only that officer)." 5 U.S.C. § 3348(a)(2)(A). The Anti-Asylum Rule must therefore be held void under the FVRA. *Accord Asylumworks*, 590 F. Supp. 3d at 23 (the FVRA's penalties apply to "all statutorily prescribed functions of a given office"); *L.M.-M.*, 442 F. Supp. 3d at 30 (the FVRA's penalties apply when a function is "assigned by statute to the office" and "not assigned by statute to any other office"); *Behring*, 544 F. Supp. 3d at 946 (the FVRA's penalties apply when a statute "designates one officer and only that officer to perform the duty or function").

C. The Court Should Issue a Declaratory Judgment.

Along with vacatur of the Anti-Asylum Rule, Plaintiffs request a declaratory judgment that the Rule was issued unlawfully. "In a case of actual controversy within its jurisdiction," a federal court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). While this provision "does not extend the jurisdiction of the federal courts," it does "'enlarge[] the range of remedies available.'" *United States v. Scantlebury*, 921 F.3d 241, 251 (D.C. Cir. 2019) (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)); *see Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (plaintiffs with "a cognizable cause of action" may "seek declaratory relief"). And importantly, "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Fed. R. Civ P. 57.

CONCLUSION

The Anti-Asylum Rule never should have been issued, because it never was approved by a DHS officer with the authority to do so, as the federal courts to consider the question and the GAO have all agreed. This Court should declare the Rule unlawful and vacate it under the APA and the FVRA. Plaintiffs' motion for partial summary judgment should be granted.

Dated: May 31, 2024

Respectfully submitted,

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